80-1681

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
ILLINOIS, ET. AL.

Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES,
INC., AN ILLINOIS CORPORATION

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED BY THE APPEAL

1. The Village's Drug Paraphernalia Licensing Ordinance defines the licensed goods as "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drug". The question presented is whether such phrase is so vague or overbroad as to render the definition unconstitutional.

PARTIES TO THE PROCEEDING BELOW:

Appellant is the Village of Hoffman Estates, Illinois, a Municipal Corporation; Virginia M. Hayter, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; Richard Williams, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; John O'Connell, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor and Lee Dodgion.

Appellee is The Flipside, Hoffman Estates, Inc., an Illinois Corporation.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

This appeal is prosecuted by the Village of Hoffman Estates, and its respective officials, from a final judgment of the United States Court of Appeals for the Seventh Circuit, reversing a judgment entered in its favor by the United States District Court for the Northern District of Illinois.

THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported but appears in the Appendix, p. 1a.

The opinion of the United States District Court, Northern District of Illinois, is officially reported at 485 F. Supp. 400 (1980), and further appears in the Appendix, page 28a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On February 20, 1978, the Board of Trustees of the Village of Hoffman Estates, Illinois, enacted its Ordinance No. 969-1978:

The initial action was filed in the District Court for the Northern District of Illinois by The Flipside, Hoffman Estates, Inc. against the Village of Hoffman Estates and its officials, pursuant to 28 USC, 1331, 2201, 2202 and 28 USC 1343 and 42 USC 1983; it challenged the constitutionality of the ordinance and sought damages and declaratory and injunctive relief against enforcement of the Village of Hoffman Estates Ordinance. Following hearings on the requests for preliminary and permanent injunctions, the District Court concluded that the Village of Hoffman Estates Ordinance 969-1978 was constitutional and it entered final judgment for the defendant Village and officials.

An appeal was taken by Plaintiff to the United States Court of Appeals for the Seventh Circuit. The Appeals Court reversed the District Court in a judgment entered January 12, 1981. A petition for rehearing was filed in the Court of Appeals for the Seventh Circuit. On February 5, 1981, the Court of Appeals denied the petition for rehearing (Appendix p. 46a). A notice of appeal to this Court was filed on March 19, 1981, in the Court of Appeals for the Seventh Circuit (Appendix p. 47a).

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Village of Hoffman Estates Ordinance 969-1978 is set forth in the Appendix, at p. 48a.

STATEMENT OF THE CASE

In February of 1978, the Village of Hoffman Estates passed the subject ordinance in an effort to cope with the drug paraphernalia problem by licensing the sale to adults and banning the sale to minors. Eighteen months later, the Drug Enforcement Administration of the United States Department of Justice published a "Model Act" to deal with the problem which has been passed by many states and local jurisdictions and is the subject of much litigation throughout the country. The "Model Act" creates criminal penalties for possession of drug paraphernalia. The ordinance herein only licenses the business selling such items and does not criminalize the use or possession of such items.

The original complaint of Appellee Flipside requested damages and injunctive relief because, among other claims, it was alleged the ordinance was "void for vagueness". The United States District Court upheld the ordinance against all constitutional attacks including "void for vagueness".

The Court found that the ordinance was narrowly drawn and recognized that "paraphernalia" has become a standard

vocabulary word in the vernacular of the community, (38a) F. Supp. 407. It found that the terms were sufficiently clear to give a reasonably clear idea of what the law requires, (39a).

The Seventh Circuit Court of Appeals limited its opinion to only the "void for vagueness" issue finding the ordinance violative of the Fourteenth Amendment since a retailer "is unable to determine what the law expects of him" (26a). The Court recognized that "in the field of regulatory statutes governing business activities . . . greater leeway is allowed" but stated that said standard "does not fit in this case" (20a).

The Court also found no rational connection between testimony that the items had been found to be used with illegal drugs (fact proved) and that therefore, said items were marketed for use with illegal drugs (fact presumed) (18a).

THE QUESTION IS SUBSTANTIAL

As the United States Court of Appeals for the Seventh Circuit stated in this case: "There has been an explosion of litigation concerning so-called drug paraphernalia laws" (4a). Such litigation is the result of a three billion dollar industry (according to DHEW Pub. No. 80-963) that has heretofore conducted its business without local or state regulation despite the fact the product line glamourizes the use of controlled substances.

Two types of regulation have emerged; licensing as in the case herein, and criminal prohibition based upon the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration. Said Model Act has been adopted by twelve states and by numerous municipalities throughout the nation. One such case is presently on appeal to this court, *City of Parma et. al.* v. *Record Revolution, No. 6, Inc.*, as Case Number 80-1507.

Cases of the past two years are cited in the Appendix at p. 51a and are cited and narrated, not for the points of law, but to give foundation to the term "explosion" and to demonstrate the need of this court to take jurisdiction of this case to clarify the numerous conflicts so the nation's municipalities and states may more effectively deal with the problem of drug abuse.

The magnitude of the problem and wide splits of authority in the Federal Courts demonstrate that this case is of such importance as to warrant plenary consideration by this court.

The issue in this case is substantial in its own right.

Three United States Supreme Court Opinions were considered in the United States District Court and the United States Court of Appeals review of the matter, *Grayned* v. *City of Rockford,* 92 S. Ct. 2294, 408 U. S. 104 (1972); *Leary* v. *United States,* 89 S. Ct. 1532, 395 U. S. 6 (1969); and *McGowan* v. *Maryland,* 81 S. Ct. 1101, 366 U. S. 420 (1960). The United States Court of Appeals accepted the applicability of *Grayned* but rejected *Leary* and *McGowan.*

The purpose and theory of the ordinance was based upon three known and trustworthy legal facts: 1) the *Leary* test that "there must be a rational connection between the facts proved and the fact presumed"; 2) Ch. 23, Section 2357 of the Illinois Revised Code which provides that tobacco cannot be sold to persons under the age of 18; and 3) Ch. 56½, Section 1312 of the Illinois Revised Code which provides that purchasers sign for Class V controlled substances.

The approach was regulatory in the same manner the Village regulates milk (Hoffman Estates Municipal Code Section 8-5-8), flowers (Hoffman Estates Municipal Code Section 8-7-7) and 68 other activities requiring licensing.

In *Grayned,* it was said by Justice Marshall that given the specific context of the ordinance, a school situation:

> "The ordinance gives 'fair notice to those to whom it is directed'. Although the Rockford ordinance may not be as

> precise as the statute upheld in *Cameron* . . . the ordinance here clearly 'delineates its reach in words of common understanding' ". 408 U. S. at 112, 113.

In the same month as *Grayned,* Justice White said in *Colten* v. *Kentucky,* 92 S. Ct. 1953, 407 U. S. 104 (1972):

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional delemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: 'We believe that citizens *who desire to obey* the statute will have no difficulty in understanding it . . .' " (Emphasis added), 407 U. S. at 110.

In a 1975 decision, *Rose* v. *Locke,* 96 S. Ct. 243, 423 U.. 48 (1975), the Per Curiam decision stated when a statute for "crimes against nature" was claimed to be vague:

> "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.
>
> Viewed against this standard, the phrase 'crimes against nature' is no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes", 423 U. S. at 50.

They further said:

> "But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties", 423 U. S. at 50.

It is again noted that the ordinance in question is a licensing ordinance for regulation purposes only and that, like *Grayned,* it gives fair notice to whom it is directed, the retailer. It is not an ordinance prohibiting possession of items by citizens

of the community who may or may not be appraised or aware of said ordinance, such as an ordinance based upon the "Model Act", but a regulatory ordinance for specific retailers who have the opportunity of clarification prior to license application.

The *McGowan* case said:

> "We believe that *business people of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the Statute* either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. . ." (emphasis added), *McGowan* v. *Maryland,* 366 U. S. at 428.

While it can be argued that persons in the industry which is to be regulated can know or should know what pipes are designed for marijuana and what pipes are designed for regular tobacco, either through their own expertise or by making reasonable investigations, the Village nonetheless would rely on *Leary* and would have the burden of proof to prove the marketing *intent* in any licensing violation hearing.

By failing to follow the dictates of this court, enforcement powers of states and municipalities by means of licensing or any other means against purveyors of drug paraphernalia are being held in abeyance. Because of fears of "unconstitutional policies" and damage suits under 42 USC, Section 1983, there is a chilling effect on government to attempt any regulation in this area and, therefore, this substantial issue warrants the court's full review.

CONCLUSION

The question presented by this appeal is substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1462

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation,

Plaintiff-Appellant,

v.

VILLAGE OF HOFFMAN ESTATES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 2114—**George N. Leighton**, *Judge.*

ARGUED OCTOBER 22, 1980—DECIDED JANUARY 12, 1981

Before SPRECHER and WOOD, *Circuit Judges*, and TEMPLAR, *Senior District Judge.**

SPRECHER, *Circuit Judge*. This appeal involves the validity of an ordinance of the Village of Hoffman Estates, Illinois ("village") purporting to regulate merchants who sell items designed or marketed for use with illegal cannabis or drugs. Plaintiff, a Hoffman Estates record store, appeals the district court's denial of plaintiff's motion for a permanent injunction and declaratory relief.

* Senior District Judge George Templar from the District of Kansas is sitting by designation.

No. 80-1462

I

On February 20, 1978, the Village of Hoffman Estates Board of Trustees enacted Ordinance No. 969-1978, entitled "an Ordinance Amending the Municipal Code of the Village of Hoffman Estates by Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs," to be effective May 1, 1978. The ordinance requires that any person within the village who sells any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license for $150.00, file affidavits averring that the applicant and each employee authorized to sell such items has never been convicted of a drug-related offense, and keep records, to be open for police inspection, of every covered item sold, along with the name and address of the purchaser. The ordinance prohibits sale to minors of any covered items. Any violation of the ordinance is punishable by a fine of not less than $10.00 nor more than $500.00, and each day that a violation continues is deemed a separate offense. In addition, the village attorney prepared "license guidelines" which define certain terms relevant to the ordinance.

Plaintiff Flipside Records ("Flipside") for more than three years prior to May 1, 1978, sold a wide variety of merchandise including smoking accessories, jewelry, novelty devices, and literature. Among these items were clamps, "alligator clips," mirrors, pipes of various types and sizes, and a large number of cigarette rolling-papers in a variety of colors. Soon after enactment of the ordinance, plaintiff was notified that Flipside appeared to be marketing items that would be covered by the ordinance. Alleging that it was unable to determine which items would be covered by the ordinance, and wishing to avoid a violation and arrest which might preclude Flipside's access to a federal forum for adjudication of its constitutional claims, Flipside removed from its shelves a wide variety of merchandise.[1] On May 30, 1978, Flip-

[1] Larry Rosenbaum, one of Flipside's officers, consulted Richard Williams, the village attorney, about which items at

(Footnote continued on following page)

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side initiated proceedings in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, Section 8, Clause 3 and Article I, Section 10 of the United States Constitution. Plaintiff also sought temporary, preliminary and permanent injunctive relief to restrain enforcement of Ordinance No. 969-1978, and damages pursuant to 42 U.S.C. § 1983 for the actions of the village and its agents,[2] which allegedly caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, Judge Leighton denied plaintiff's motion for a temporary restraining order. On September 1, 1978, a hearing on the motion for a preliminary injunction was held, and Judge Leighton denied the motion. The trial for a permanent injunction and declaratory judgement was held on March 23, 1979. On February 11, 1980, the trial court entered a Memorandum Order awarding judgment to the defendants. *Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates*, 485 F.Supp. 400 (N.D.Ill. 1980). Plaintiff appeals that order on several constitutional grounds, alleging that Ordinance No. 969-1978 is impermissibly vague in violation of the due process clause of the Fourteenth Amendment and violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

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[1] *continued*
Flipside would be covered by the ordinance. Williams advised Rosenbaum to use the police register for *all* items, for his protection. (Transcript of March 23, 1979 at 87-88)

[2] Defendants are the village, an Illinois home rule municipality with a population of approximately 37,000; and, in their individual as well as official capacities, Virginia W. Hayter, village president; Richard Williams, village attorney; John O'Connell, village chief of police; William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dodgion, village trustees.

II

Since this case began in the district court, and indeed, since the district court's opinion was published in February, 1980, there has been an explosion of litigation concerning so-called drug paraphernalia laws. Most of the cases involve statutes or ordinances which make the sale, manufacture, or possession of drug paraphernalia a crime, usually a misdemeanor.[3] There have been a variety of results in the district courts, even within the same district.[4] As of this writing none of these paraphernalia law cases has been decided by a court of appeals on the merits,* although in *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980), in entering a preliminary injunction restraining enforcement of an ordinance the court flatly stated that the challenged ordinance was unconstitutionally vague on its face. 618 F.2d at 28.[5]

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[3] In *Housworth v. Glisson*, 485 F.Supp. 29 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980), as here, there was not a criminal drug paraphernalia law at issue, but rather a licensing ordinance. In *Housworth* plaintiffs' business licenses were revoked for selling drug paraphernalia. The court found the licensing ordinance void for vagueness because it gave plaintiffs no adequate warning of the activity which would lead to license revocation.

[4] Identically worded statutes were treated differently within the same district in *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich.,S.D. June 21, 1979; On Motion For New Trial, March 12, 1980) (upholding City of Novi ordinance) and *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich., S.D. April 9, 1980) (striking down city of Ferndale ordinance on vagueness grounds). In *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D.Iowa 1980), an identical ordinance also was struck down for vagueness.

* *See* note 32.

[5] Also, with respect to printed matter rather than paraphernalia, the Fifth Circuit found unconstitutional a statute prohibiting sale of drug-related printed material to minors. *High Ol' Times, Inc. v. Busbee*, 621 F.2d 141 (5th Cir. 1980), *affirming*, 456 F.Supp. 1035 (N.D.Ga. 1978). While many of the above mentioned challenges to paraphernalia laws allege first amendment violations, none of these statutes or ordinances ban sale of literature outright.

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The challenges to drug paraphernalia statutes often involve a number of constitutional claims, as here where the village ordinance is attacked on due process, equal protection, and first amendment grounds. The successful attacks usually have won on the issue of due process: drug paraphernalia statutes have been found impermissibly vague in violation of the due process clause of the Fourteenth Amendment.[6]

In August, 1979, the Drug Enforcement Administration of the United States Department of Justice published the "Model Drug Paraphernalia Act" ("Model Act"). According to the comments published with the Model Act, it was drafted to enable states and local jurisdictions to cope with the paraphernalia problem and is intended to be enacted as an amendment to the Uniform Controlled Substance Act, which has been adopted by Illinois and many other states.[7] District courts have recently upheld laws based on the Model Act, although a

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[6] In general, those cases striking down paraphernalia laws (1) have found the definition of "drug paraphernalia" to be too vague to give adequate notice of what is prohibited and (2) have found inadequate the degree of intent or knowledge that an item is drug-related necessary to hold a defendant criminally liable under the statute or ordinance. *See Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980); *Record Head Corp. v. Sachen*, No. 80-C-639 (E.D.Wis. Sept. 30, 1980); *Hejira Corp. v. MacFarlane*, No. 80-F-824 (D.Colo. Sept. 5, 1980); *Magnani v. City of Ames*, 493 F.Supp. 1003 (S.D.Iowa July 21, 1980); *Smith v. Roark*, No. 80-2110 (S.D.W.Va. May 13, 1980); *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. April 9, 1980); *Knoedler v. Roxbury Township*, 485 F.Supp. 990 (D.N.J. March 5, 1980); *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. TH 75-142-C (S.D.Ind. Feb. 4, 1980); *Record Museum v. Lawrence*, 481 F.Supp. 768 (D.N.J. Dec. 11, 1979). *See also, Bambu Sales, Inc. v. Gibson*, 474 F.Supp. 1297 (D.N.J. Aug. 6, 1979) (ordinance not vague, but struck down on overbreadth grounds).

[7] The Uniform Controlled Substance Act was enacted by Illinois in 1971. Ill.Stat.Ann. ch. 56½, § 1100 *et seq.* The Justice Department's Model Act is the model for Senate Bill 1505, introduced in the Illinois legislature but not as yet finally acted upon by both houses.

few have found it necessary to sever some parts.[8] These courts agree that criminal statutes, prohibiting the manufacture, sale, or possession of items determined to be drug paraphernalia, must be carefully drafted in order to focus on the drug-related intent of the person charged.[9]

III

The ordinance at issue here differs from the type of statutes at issue in the above-cited cases. Hoffman Estates Ordinance No. 969-1978 does not attempt to criminalize the sale or possession of drug-related devices. In fact, the preamble to the ordinance states, "it is recognized that such items are legal retail items and that their sale cannot be banned . . . ." Yet one of the purposes of the ordinance obviously must be to do in-

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[8] *Mid-Atlantic Accessories Trade Ass'n v. Maryland*, No. H-80-1343 (D.Md. Nov. 11, 1980); *Tobacco Accessories v. Treen*, No. 80-3372 (E.D.La. Oct. 28, 1980); *Florida Businessmen for Free Enterprise v. Florida*, TCA 80-0954 (N.D.Fla. Sept. 30, 1980) (upholding those portions of law based on Model Act, but striking sections that differ from the Model Act by punishing "possession" rather than "possession with intent to use" paraphernalia); *The Casbah, Inc. v. Thone*, No. 80-0-271 (D.Neb. Sept. 26, 1980) (ordinance constitutional after excising "reasonably should know" constructive knowledge/intent section and "legitimate supplier" evidentiary factor for determining whether an item is drug paraphernalia); *Florida Businessmen for Free Enterprise v. City of Hollywood*, No. 80-6157-Civ-NCR (S.D.Fla. Aug. 29, 1980); *Delaware Accessories Trade Ass'n v. Gebelein*, No. 80-285 (D.Del. Aug. 15, 1980); *World Imports v. Woodbridge Township*, 493 F.Supp. 428 (D.N.J. 1980); *Levas v. Village of Antioch*, No. 80-C-1574 (N.D.Ill. April 22, 1980) (definition of paraphernalia based on Model Act).

[9] *See* comments to Model Act and cases cited in note 8, *supra*. Most of these cases explain that the laws upheld escape vagueness because they require defendant's specific intent or knowledge that the items in question are used with illegal drugs. A statute is not unconstitutionally vague if it embodies a specific intent to violate the law. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101 (1945).

directly what it claims it cannot do directly—to effectively ban the sale of a broad class of items, some of which may be used with illegal drugs. After all, few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of signing their names and addresses to a register available to the police. But the legal issue here does not depend on the covert purpose of de facto banning certain items. Even if the ordinance does discourage the sale of some "innocent" items, the ordinance would be constitutional so long as it carefully defined the items sought to be regulated so that a person in plaintiff's position could determine whether, and to which items, the license requirement applied.[10]

As stated in *Geiger v. City of Eagan*, 618 F.2d 26, 28 (5th Cir. 1980), a city "clearly has the power through a properly drawn ordinance to discourage the availability of drugs and the acceptance of drug use by prohibiting the sale of drug-related devices."[11] Thus the village may, with a properly drawn ordinance, regulate drug paraphernalia. The type of regulation chosen here bears a rational relation to the village's interest in preventing drug abuse. It prevents convicted drug dealers and users from selling paraphernalia and thereby gaining contacts with a ready market, and it forbids the sale of paraphernalia to minors. But sympathetic as we are with the village's attempt to fight drug abuse through this novel licensing scheme, the village must do so in a constitutional manner.

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[10] *See* discussion of vagueness in Part IV of this opinion.

[11] The court in *Geiger* went on to enter a preliminary injunction restraining enforcement of an ordinance which prohibited the "possession, sale, transfer or display for sale or transfer" of "drug related devices." While the grant of a preliminary injunction does not decide the merits, the court focused on the vagueness of the ordinance's definition of the term "drug-related device" and flatly declared "[w]e consider the ordinance unconstitutionally vague on its face." 618 F.2d at 28.

IV

The critical issue here is whether this ordinance is so vague as to violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court set out the policies behind the due process doctrine of vagueness. In a passage cited in virtually every opinion dealing with vagueness challenges to statutes or ordinances, the Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09 (footnotes omitted). *See also Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license,[12] not prohibit, sale of "items

[12] A more typical type of vagueness challenge to a licensing statute involves an attack on the standards for denying or revoking, rather than requiring, a license. *See Housworth v. Glisson*, 485 F.Supp. 29, 36-39 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980). *Housworth*, like this case, involved attempted regulation of retail stores which sold items which could be used with illegal drugs. Plaintiffs' business licenses

(Footnote continued on following page)

designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions, because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). *See also Bence v. Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); *Soglin v. Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin v. King*, 417 F.2d 458, 461 (10th Cir. 1969).

In order to analyze plaintiff's facial attack on this ordinance, we set out the entire ordinance adopted by the

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[12] *continued*
were revoked based on a local ordinance which allowed the county director of finance to revoke the license of any business found to be a "hazard to the health, safety and welfare of the citizens of the county," 485 F.Supp. at 36. The court applied the *Grayned* standards, found the ordinance unconstitutionally vague, and preliminarily enjoined enforcement against plaintiffs. *See also Aladdin's Castle, Inc. v. City of Mesquite*, 434 F.Supp. 473 (N.D.Tex. 1977) (invalidating ordinance prohibiting issuance of license for coin-operated amusement center to anyone having a "connection with criminal elements").

There are obvious differences between *revoking* a license on the basis of inadequately defined conduct and *requiring* a license in order to engage in the conduct. But in both cases, because of the retailer's constitutionally protected interest in his business, the ordinance must be drawn clearly enough to warn a retailer of what the law requires.

village, as well as the license guidelines which became an integral part of the ordinance.

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia,

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accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department

of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

As noted above, in order to survive a vagueness attack, an ordinance must give persons a reasonably clear

idea of what the law expects of them. We agree with the district court that "[i]t is obvious that this ordinance is not a model of legislative clarity; defendants do not claim that it is." 485 F.Supp. at 406. Of course, in determining whether a statute or ordinance is vague, a court cannot invalidate every ordinance which could have been drafted more precisely, since "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U.S. 282, 286 (1945). But the inherent vagueness of the English language, coupled with the admirable intention of stemming drug abuse, cannot save an ordinance which fails to give fair notice of what it prohibits.

According to the district court, the plaintiff should be able to tell what the ordinance requires of it by looking to the common, ordinary, dictionary meanings of the words "items", "effect", "paraphernalia", "accessory", and "thing".[13] But the fact that these five words have ordinary dictionary meanings does not sufficiently clarify the scope of the licensing requirement, which applies to any person who sells any "items, effect, paraphernalia, accessory or thing *which is designed or marketed for use with illegal cannabis or drugs.*" The italicized phrase is the key to triggering application of the statute. The words "designed", "marketed", "cannabis", and "drugs"

[13] The district court noted that plaintiff removed a total of 72 items from its shelves, and that thereafter defendants conceded that plaintiffs were in compliance with the ordinance because they no longer sold any ". . . thing which is designed or marketed for use with illegal cannabis or drugs." 485 F.Supp. at 407. The court stated that the removal of these items by plaintiffs demonstrates that "plaintiff was not hampered by any vagueness in the words of the subject ordinance." *Id.* Plaintiff vigorously denies that its actions represent any acknowledgment that it sold drug-related paraphernalia. Rather, a wide variety of items were removed from the shelves in order to ensure that no violation of the ordinance could be found. Plaintiff wished to avoid the initiation of local proceedings that might cause a federal court to abstain from considering plaintiff's constitutional claims until all state remedies had been exhausted. *Younger v. Harris*, 401 U.S. 37 (1971).

may also have common, ordinary meanings which can be found in a dictionary, but the entire phrase is more than the sum of the meanings of the individual terms used. Unless the license guidelines give additional clarity to this phrase, we must agree with plaintiff that the ordinance is so vague that it does not give sufficient notice to merchants as to whether they are required to obtain a license, and for which items the name and address of the purchaser must be recorded and sale to minors prohibited.

Turning first to the words of the ordinance, the primary words to be interpreted are "designed" and "marketed", since these words link the innocuous terms "item", "effect", "paraphernalia",[14] "accessory", and "thing" to illegal drugs, thereby triggering the regulatory purpose.[15] The phrase "designed for use with drugs" was held to be one of the fatal flaws, in an ordinance far more detailed than the one at issue here, by a three-judge district court in Indiana. In *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. TH 75-142-C (S.D.Ind. Feb. 4, 1980) (Swygert, Cir. J. presiding)[16] the court stated:

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[14] The district court treated the term "paraphernalia" in the ordinance as having its non-technical meaning, namely "articles of equipment." 485 F.Supp. at 407, citing Webster's Third New International Dictionary (Unabridged ed. 1971) at 1638. But "paraphernalia" is also becoming a standard term to refer to the whole class of allegedly drug-related items which this ordinance attempts to regulate.

[15] The purpose of the regulation is found in the preamble of Ordinance No. 969-1978, which provides in part, "it is in the best interest of the health, safety, and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs."

[16] On appeal to this court the case was declared moot and remanded for dismissal because the Indiana Legislature had repealed the statute held to be unconstitutional, and the successor statute was the subject of new litigation. *Indiana Chapter, N.O.R.M.L. v. Sendak*, No. 80-1305 (7th Cir. July 22, 1980).

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> It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.

Id., slip op. at 12-13.

The license guidelines imply that items "designed" for use with drugs mean those items which are inherently suited only for drug use, and are thus covered by the ordinance regardless of the manner of display or avowed intent of the retailer. For example, the guidelines state that "roach clips" are "*designed* for use with illegal cannabis or drugs and therefore covered," (emphasis added). But the guidelines do not define "roach clip." Consequently, stocking any item that could possibly be used as a roach clip, such as an alligator clip or bobby pin, could subject a retailer to the licensing requirement. In reality, it is inconceivable that sale of these innocent items would subject a hardware store or drugstore to the burdens of the license fee and sales register, as well as to the label of "drug paraphernalia store." Perhaps the village wishes to draw a line between items which inherently *are* roach clips and "innocent" items merely *used* as roach clips. But neither the ordinance nor the guidelines draws this distinction, and we are uncertain

as to whether any definition of a roach clip could draw such a distinction based on design alone.[17]

Another item which the guidelines say is inherently drug related is "paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed." But the guidelines also say that "white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed." This guideline attempts to tell the retailer which rolling papers are covered and which are not, but the definition is circular because it puts the burden back on the retailer to decide what is "tobacco oriented" paper not necessarily *designed* for use with drugs and what is "drug oriented" paper. Is all white rolling paper outside the ordinance, even if there is an advertisement for a water pipe on the package? Does "paper of colorful design" mean that brown or beige paper is covered, or could some colored paper be considered "tobacco oriented"?

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[17] The following exchange took place at the March 23, 1979, trial during Leavitt's questioning of Williams, the village attorney who drafted the ordinance and guidelines:

BY MR. LEAVITT:

Q What design differential between the alligator clip displayed in Exhibit No. 6 and the alligator clip displayed in No. 80?

A The design and marketing of the—

Q I asked only about design. Is there any design differential?

A No.

Q Now if I were to tell you that Exhibit No. 6 was sold in a Flipside Records without any signs but merely there where literature was displayed, where the literature that contained, The Child's Garden of Marijuana or whatever other literature they displayed, would it then be a regulated item?

A It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

Transcript of March 23, 1979 at 77-78.

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An additional element of vagueness in the "designed for use with drugs" standard is added by the fact that the manufacturer, not the retailer, designs the items sold. Consequently, the design intent of the manufacturer, not of the regulated seller, triggers the retailer's duty to obtain a license and the customer's obligation to sign a register available to the police.[18]

Next, we examine the phrase "*marketed* . . . for use with illegal cannabis or drugs" to determine whether the vagueness already noted can be eliminated. Defendants argue that the ordinance's reference to the *marketing* approach used by a retailer makes possible an inference about the seller's intent to sell a given item for use with illegal drugs.[19] Defendants argue that presuming that an item is intended for use with drugs from a retailer's marketing approach satisfies the test for the validity of a statutory presumption, specifically that

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[18] If this were a criminal ordinance, subjecting retailers and customers to prosecution based solely on the design intent of a third party, the manufacturer, there would be little question as to the law's invalidity. *See* note 9, *supra*.

[19] The following exchange took place during plaintiff's examination of Williams:

> Q Does your ordinance contemplate control or regulation of those things which you have defined in the guidelines under your words as "roach clips"?
>
> A The ordinance regulates paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs. It does not specifically state roach clips.
>
> Q I was referring to the guidelines which specifically says—
>
> A Those that are designed for use with illegal cannabis and drugs are therefore covered.
>
> Q What I am asking is how do you know what you are selling is a roach clip? The design you have agreed is the same. How does the individual, without the benefit of a policeman monitoring each and every item he sells, know whether or not it is a glove stretcher or a roach clip?
>
> A This is where the marketing concept enters in.

Transcript of March 23, 1979 at 78-79.

"there be a rational connection between the facts proved and the fact presumed." *Leary v. United States*, 395 U.S. 6, 33 (1969), quoting *Tot v. United States*, 319 U.S. 463, 467 (1943). Defendants' reliance on *Leary* is misplaced. In *Leary* the Court struck down a presumption that a person in possession of marijuana knows that the marijuana is of foreign origin.[20] The court held that despite the fact that most domestically consumed marijuana comes from abroad, 395 U.S. at 39-44, "it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marijuana." 395 U.S. at 53. The issue in *Leary* was whether the "fact proved," (marijuana possession), and "fact presumed," (knowledge of importation), were rationally connected. But the issue here is whether the "fact proved," (marketing scheme), is too vague a standard to give rise to the "fact presumed," (drug-relatedness).[21] This vagueness issue is quite different from the "rational connection" issue in *Leary*.

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[20] Leary was convicted of violating 26 U.S.C. § 176a, which provided in relevant part:

> Notwithstanding any other provision of law, whoever, *knowingly*, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, *knowing the same to have been imported or brought into the United States contrary to law*, or whoever conspires to do any of the foregoing acts, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, *such possession shall be deemed sufficient evidence to authorize conviction* unless the defendant explains his possession to the satisfaction of the jury.

395 U.S. at 10 (emphasis added).

[21] Since we find that defendants have not adequately defined their "marketing concept" so as to give retailers fair notice of what the licensing ordinance requires of them, we do not reach the issue of whether, or what kind of, marketing factors can give rise to a presumption of intent for use with drugs.

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The license guidelines purport to define the type of marketing approach that is indicative of the sale of items for use in conjunction with illegal drugs. For example, the guidelines indicate that ordinary pipes can be distinguished from drug-related pipes according to the pipes' proximity to nonwhite paper, roach clips, or literature encouraging illegal use of cannabis or drugs.[22] Similarly, "paraphernalia" is covered "if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs." The word "paraphernalia" is nowhere defined, but, as discussed earlier, the district court found that the word should be given its ordinary meaning of "articles of equipment." Thus, it appears that displaying almost any item in the proximity[23] of "literature encouraging illegal use of . . . drugs" requires the store to obtain a license and have purchasers sign the register. This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is that there is no way for a seller to determine which particular items or arrangement of merchandise will require a license.

Defendants argue that the phrase "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" adequately defines that has become known as drug paraphernalia,[24] so that a retailer in plaintiff's position

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[22] The guidelines state in part:

> Pipes—if displayed away from nonwhite paper or *tobacco oriented* paper, . . . are not covered;

(emphasis added). We assume that the guidelines mean that pipes are not covered if displayed away from *non*-tobacco oriented paper. This would be consistent with the guidelines on paper. However, read literally, the guidelines imply that pipes are "covered" if displayed near tobacco oriented paper, yet not covered if displayed only near white paper, even if it is white paper with "names oriented for use with illegal cannabis . . . ."

[23] The guidelines do not define "proximity".

[24] *See* note 14, *supra*.

can determine whether the ordinance applies to him. Defendants cite *McGowan v. Maryland*, 366 U.S. 420, 428 (1961), for the proposition that when a regulatory ordinance applies to a *retailer*, who has an opportunity for clarification prior to license application, problems of interpretation which might confuse ordinary citizens do not arise. In *McGowan*, which involved a statute that exempted from Sunday closing laws retail sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches and amusement parks, the Court stated:

> We believe that *business people* of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county.

366 U.S. at 428 (emphasis added).

Despite the fact that "[i]n the field of regulatory statutes governing business activities where the acts limited are in a narrow category, greater leeway is allowed," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), this ordinance fails to satisfy the principles behind the vagueness doctrine. The greater leeway allowed when an ordinance is applied to a retailer, who supposedly is familiar with his industry, does not fit this case. The *McGowan* standard allows "ordinary commercial knowledge" or "reasonable investigation" to clarify the standards of an ordinance.[25] But to

[25] In *Tobacco Road v. City of Novi*, 490 F.Supp. 537 (E.D.Mich. 1980), a retailer was held to a higher standard of knowledge of paraphernalia than others, based on the passage from *McGowan* cited *supra*, and the court found that the ordinance was not vague as applied to retailers. 490 F.Supp. at 545-48. But an identical ordinance enacted in the city of Ferndale was later struck down in the same district in *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. 1980). In *Music Stop* the *McGowan* standard was also cited, and the court concluded that even if it imposed *McGowan's* "reasonable investigation" requirement on retailers, the ordinance was impermissibly vague. 488 F.Supp. at 393.

apply the *McGowan* analysis here would beg the question in issue. To apply that standard as defendants suggest would presuppose that the business the retailers are engaged in is the business of selling items "designed or marketed for use with illegal cannabis or drugs." The plaintiff vigorously contests that characterization of its business.

A further element of vagueness in the marketing concept arises from the danger of arbitrary and discriminatory enforcement by those charged with enforcement of the ordinance. *See Grayned*, 408 U.S. at 108-09. Since, as discussed above, the ordinance and guidelines are vague as to what constitutes items designed for use with illegal drugs, the ordinance is equally vague as to which supposedly designed-for-drug items will bring other items under the ordinance through the marketing proximity standard. If an item is not considered drug-related *per se*, then the subjective factors that enter into interpreting a retailer's marketing scheme make possible the dangers noted in *Housworth v. Glisson*, 485 F.Supp. at 38 (N.D.Ga. 1978), *aff'd*, 614 F.2d 1295 (5th Cir. 1980):

> Most people may agree that selling devices which have no obvious purpose other than to facilitate the use of dangerous drugs threatens the community's health, welfare and safety. But the decision of which devices fit this category becomes more difficult when something as innocuous and susceptible of legal or merely decorative use as a "marijuana pipe" is involved. Whether selling this merchandise falls within the ordinance's prohibition is a debatable question, *particularly when conflicting lifestyles and political views suffuse the decision maker's perception of what buyers will do with the product.*

(Emphasis added).

We find that there does exist a genuine danger that enforcement of this ordinance will be used to harass individuals choosing lifestyles and views different from those of the majority culture. Defendants may argue

that "conflicting lifestyles and political views" will not affect enforcement of the ordinance, but defendants already demonstrate a certain bias when they state in their brief "[d]efendant Village does expect that the marketing approach that encourages drug use by youth will be eliminated by responsible businesses and conducted under reasonable regulation by other businesses." Appellees' Brief at 11. Defendants obviously have concluded that no business which must be licensed under the ordinance is a "responsible business." Thus the ordinance is not, as the village argues, the same as the village's regulation of milk, flowers, and other activities requiring a license. Rather, the ordinance brands licensees as irresponsible businesses, a stigma which should not be applied according to the tastes of village officials who may be offended by a retailer's marketing approach. Thus, with regard to both the design and marketing standards, the ordinance "impermissibly delegates basic policy matters to [those charged with administering the ordinance] for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-09.[26]

Another aspect of the ordinance which creates the danger of arbitrary enforcement, as well as failing to notify retailers of what the law expects of them, is Section 1(D) of the ordinance which provides:

> Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

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[26] The possibility that the enforcement standards may be clarified in the future by proceedings under the village's Administrative Procedures Ordinance does not cure the vagueness found here. *See* discussion in Part V of this opinion.

Defendants argue that this record-keeping requirement is supported by Illinois Revised Code ch. 56½, Section 1312, which requires that purchasers sign for Schedule V controlled substances.[27] But since possession or distribution of Schedule V substances is in itself illegal, except as authorized for medical purposes,[28] the Section 1312 register serves to detect illegal, non-medical use by purchasers or pharmacists. In the ordinance before us, however, the items to be regulated are, according to the ordinance itself, "legal retail items," unlike Schedule V substances. Nevertheless, the record-keeping section implies that a customer who purchases an item "designed or marketed for use with illegal cannabis or drugs" intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item.

The potential for abuse in inferring use or possession of drugs from purchase or possession of certain items was noted by the Eighth Circuit in *Geiger v. City of Egan*, 618 F.2d 26 (8th Cir. 1980). In *Geiger*, the court struck down a statute which made possession of a "drug-related device" a misdemeanor. The court stated:

> Where definite guidelines for enforcement officials are not present, use of the ordinance to expand arrest opportunities and justify searches magnifies the potential harm from enforcement of the ordinance.

618 F.2d at 29 (footnote omitted). The danger here is similar to the danger in *Geiger*. Here the danger of abuse arises from use of the police register, while in *Geiger* the danger arose from use of an arrest for possession of drug-related items as a basis for a search for controlled substances. While the ordinance here does not

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[27] Schedule V substances affected by Section 1312 include codeine, dihidrocodeine, and ethylmorphine. *See* ch. 56½, § 1212. There is no vagueness in the definition of these substances, unlike the definitions of the items to be regulated in the village's ordinance.

[28] *See* Ill.Rev.Stat. ch. 56½, §§ 1401, 1402, 1406.

make purchase of drug-related devices a criminal offense, the underlying problem of potential enforcement abuse arising from the registration requirement remains.[29]

V

Finally, defendants contend that the "licensing guidelines" represent only a beginning in clarifying what are "items. . . . designed or marketed for use with illegal cannabis or drugs." Defendants point to the village's Administrative Procedures Ordinance, No. 932-1977, which provides procedures for rule-making, including provisions for public comment on proposed rules, petition for adoption of new rules, and appeal of the adoption, amendment, or repeal of rules.[30]

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[29] On May 29, 1979, the parties entered a stipulation which provided in part:

> The primary purpose of that part of the challenged Ordinance, which requires that merchants maintain a police register or record of purchasers, of those items sought to be regulated, is to discourage persons in the Hoffman Estates community from purchasing those items. That the requirement that all purchasers of items sought to be regulated sign a police record, open to police inspection, serves to discourage customers, much the same way that requiring patrons of a motel to sign a guest register discourages certain persons from using the services of that type of establishment.

While the primary purpose of the registration requirement may well be to discourage purchase of certain items, we are not convinced that the danger of unjustified searches and arrests noted in *Geiger* is not present here.

[30] The relevant sections of the Administrative Procedures Ordinance deal with the procedures for rule-making, petition for adoption of rules, and appeal, and are set out as follows:

> Sec. 5-8-4—Procedure for rule-making:
>
> (A) Prior to the adoption, amendment or repeal of any rule, each Department shall:
>
> (1) Give at least 10 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of

(Footnote continued on following page)

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Presumably speaking of rules the village may adopt in the future pursuant to its Administrative Procedures Ordinance, defendants state, "[w]hile speculative, it is likely the guidelines in the Model Act . . . would be used to identify the design and marketing intent."[31]

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[30] *continued*

the subjects and issues involved, and the time, place and manner in which interested persons may present their views concerning the intended action. The notice shall be mailed to each person who has made timely request of the Department for advance notice of its rule-making proceedings.

(2) Afford all interested persons reasonable opportunity to submit data, views or arguments, which may, in the discretion of the Department be submitted either orally or in writing or both. The Department shall consider fully all submissions respecting the proposed rule.

. . .

Sec. 5-8-6—Petition for adoption of rules: Any interested person may petition a Department requesting the promulgation, amendment or repeal of a rule. Each Department shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the Department has not initiated rule-making proceedings in accordance with Section 5-8-4 of this Article, the petition shall be deemed to have been denied.

Sec. 5-8-7—Appeals: Any person aggrieved by the adoption, amendment or repeal of any rule under the procedures herein may request that the Village Manager place the issue before the appropriate committee of the Village Board. There shall be an opportunity for the aggrieved person or persons and the Department to present the merits of the issue before the Committee. The Committee shall make a recommendation to the Village Board. The Village Board shall resolve the issue by Resolution or Ordinance, as appropriate.

[31] As discussed in Part II, the Model Act is a criminal statute. In addition to providing guidelines for determining whether an object is drug paraphernalia, the Model Act requires proof of intent or knowledge by a seller that an item will be used as drug paraphernalia. Furthermore, while the Model Act has been approved by some courts, its constitutionality is not before this court

Appellees' Br. at 7. But the mere possibility that the vagueness in this ordinance might later be corrected by additional guidelines certainly cannot be a sound basis for holding it constitutional.

As discussed in Part IV, this ordinance is impermissibly vague on its face. Therefore, it does not provide an administrative body with adequate standards to guide and limit the administrators' discretion in drawing guidelines. "Further, where, as here, a rule contains no ascertainable standards for enforcement, administrative and judicial review can be only a meaningless gesture." *Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975). In addition, the possibility that plaintiff itself may appeal or propose new guidelines under the Administrative Procedures Ordinance does not shift the burden to plaintiff to ensure that the village adopts rules with ascertainable standards.

As stated in *Grayned*, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." 408 U.S. at 108. This ordinance and the existing guidelines fail to adequately define the items to be regulated, and thus a retailer in plaintiff's position is unable to determine what the law expects of him. Thus, this ordinance must be declared void for vagueness.[32] Since we find this ordinance void for vagueness, it is unnecessary to reach plaintiff's other constitutional claims, and we express no opinion on them.

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[32] After this opinion was written, but before it was released, the Sixth Circuit issued its opinion in *Record Revolution No. 6, Inc. v. City of Parma*, No. 80-3308 (6th Cir. Dec. 8, 1980). The Sixth Circuit held three ordinances based on the Model Act to be unconstitutional. That opinion, like our opinion here, found the "designed for use" standard unconstitutionally vague.

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The order of the district court is

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—1-12-81—350

OPINION OF THE DISTRICT COURT

Seller of records, tobacco-use related items, etc., sued village and others seeking declaration that village drug paraphernalia ordinance was unconstitutional. The District Court, Leighton, J., held that: (1) considering contemporaneously adopted guidelines, together with terms used, operative words of the ordinance, which regulated the sale of an item, effect, paraphernalia or thing which is designed or marketed for use with illegal cannabis or drugs, were not unconstitutionally vague; (2) ordinance, which required a license, which, inter alia, prohibited employment of anyone convicted of drug-related offenses and which required seller to record to whom subject items were sold and prohibited sales to minors, did not violate First Amendment rights; (3) ordinance was not overbroad, and (4) ordinance did not violate equal protection as it bore a rational relationship to legitimate governmental purpose of controlling use of cannabis and other illegal drugs.

Judgment for defendants.

Memorandum

LEIGHTON, District Judge

This suit is against a village, several of its officials, and its trustees, for injunctive relief, damages, and a judgment declaring that a certain village ordinance is unconstitutional. Jurisdiction of this court is invoked under 28 U.S.C. §§ 1331, 1343(3) and (4). The ordinance in question requires that any person who, within the village, sells an item, effect, paraphernalia or thing which is designed or marketed for use with illegal cannabis or drugs must obtain a license for $150.00, file affidavits averring that the intended licensee and its employees have never been convicted of a drug related offense, and keep records which on inspection will disclose to the police each item sold and to whom. The sale of such items to minors is prohibited; and the ordinance provides for a fine of not less than $10.00 and up to $500.00 for any violation of its terms.

Plaintiff alleges in its complaint that this ordinance is vague, overbroad, capable of being arbitrarily enforced, and not reasonably related to any legitimate governmental objective of the village in controlling drug abuse. It claims that enactment and enforcement of the ordinance will deprive plaintiff of rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and that the terms of the ordinance when applied to the plaintiff violate the First Amendment and the commerce clause of the Constitution. On filing of its suit, plaintiff moved for a preliminary injunction which after a hearing the court denied. Then the cause was tried without a jury on the presented evidence and stipulated testimony. The following are the material facts.

I.

The plaintiff in this case is Flipside, Hoffman Estates, Inc., an Illinois corporation engaged in interstate commerce as Flipside Records, 2348 West Higgins Road in the village of Hoffman Estates, Illinois. Defendants are the village, an Illinois home rule municipality that has a population of approximately 37,000; and in their individual as well as official capacities, Virginia M. Hayter, village president; Richard Williams, village attorney; John O'Connell, village chief of police; William W. Cowin, William A. Palmer Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dogion, village trustees.

For more than three years prior to May 1, 1978, plaintiff sold phonograph records, tapes, record accessories, novelty devices, and jewelry. In addition, it sold literature that included "A Child's Garden of Grass", "Marijuana Grower's Guide", and magazines such as "National Lampoon", "Rolling Stone", and "High Times". The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged

from small commodities such as clamps, chain ornaments, and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word "Cocaine" painted on its surface in a purple color. Plaintiff sold cigarette holders, "alligator clips", herb sifters, vials, and a variety of tobacco snuff.

The defendant village, for a long time prior to the date of this controversy, regulated more than 80 items or businesses, including florists, grocers and other merchants. Licensing of the sale of these items was governed by a municipal code which on October 3, 1977 was amended to provide for an administrative review procedure within the village. Under this amendment, the action of any village department could on request of an aggrieved person be placed on the agenda of an appropriate committee for review.

On February 20, 1978, an authorized quorum of the village trustees acted on the following proposal.

ORDINANCE NO. 969—1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8—7—16, which additional section shall read as follows:

Sec. 8—7—16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8—1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8—7—16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the licensee's sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8—2—1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offenses and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

The ordinance was adopted, effective May 1, 1978. To it was attached the form of affidavit which an applicant for the required license was to execute concerning absence of any conviction of a drug related offense. The form of record which had to be kept showing sales of items designed or marketed for

use with illegal cannabis or drugs was also attached to the enactment. A short time later, before the suit in this case was filed, the village attorney prepared a set of license guidelines which became an integral part of the ordinance.

> LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS
>
> Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.
>
> Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.
>
> Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.
>
> Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

Soon after the enactment of the ordinance, plaintiff was notified that it was subject to the terms of the ordinance, and that sales of the items covered without complying with the terms would be a violation and subject plaintiff to its penalties. A copy of the ordinance and the guidelines were available to the plaintiff and those who protected its interests. Plaintiff chose not to apply for the license required. Instead, acting through its agents and employees, it elected to remove from the shelves of its store more than eighty items which were believed to fall within the terms of the ordinance. Then plaintiff, on May 30, 1978, filed this suit alleging that the ordinanace in question

was vague and thus void; that its terms violated Article I of the Constitution of the United States in that it interferred with the plaintiff's business; that the ordinance violated the commerce clause of the federal Constitution and deprived plaintiff of rights secured to it by the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. Plaintiff prayed that this court restrain defendants from enforcing Ordinance No. 969—1978, Section 8—7—16, and that this court declare in a judgment that the ordinance was violative of the constitutional protections alleged by plaintiff and thus was void and unenforceable. Defendants' answer denied plaintiff's allegations and its claims for relief. In post-trial briefs, the parties have submitted their arguments and contentions on the issues presented.

II.

A.

The first issue is whether the ordinance in question is vague, and thus its application to the plaintiff and its business violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. Vague laws offend several important values in our society. *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). They may trap the innocent by not providing fair warning; they may fail to provide explicit standards for those who apply them; they impermissibly delegate basic policy matters for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application. *Id.* at 108, 92 S.Ct. at 2298.

A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A. B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 597 (1925); *see Horn v. Burns and Roe,* 536 F.2d

251 (8th Cir. 1976). Accordingly, the due process clause of the federal Constitution requires that civil and criminal enactments, and regulations promulgated pursuant thereto, be sufficiently clear that persons who are affected can gain a reasonably clear idea of what the law requires of them. *Franklin v. First Money, Inc.*, 427 F.Supp. 66, 67 (E.D.La.1976), *aff'd*, 599 F.2d 615 (5th Cir. 1979). In determining whether a legislative enactment meets these requirements the same rules of construction are used whether it is a statute or ordinance. *Martin v. King*, 417 F.2d 458, 461 (10th Cir. 1969).

This prohibition against vagueness does not invalidate every ordinance which a court believes could have been drafted with greater precision. Many ordinances will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties". *Robinson v. United States*, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945). All the due process clause requires is that a law should give warnings sufficient to enable a person, in the conduct of his or her affairs, to avoid that which is forbidden. *Rose v. Locke*, 423 U.S. 48, 50, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975). Therefore, a statute or ordinance is unconstitutionally vague when it fails to give fair notice of what it prohibits. *State v. Zwicker*, 41 Wis.2d 497, 164 N.W.2d 512, *appeal dismissed* 396 U.S. 26, 90 S.Ct.199, 24 L.Ed.2d 147 (1969).

However, in determining whether a statute or ordinance is vague, a court should bear in mind that "[t]he Office of Judges is always to make such construction as to suppress the Mischief [which is the object of the law] and advance the Remedy; and to suppress subtle Inventions and Evasions for Continuance of the Mischief." *Heydon's Case*, 3 Co. 7a, 7b *Magdalon College Case*, 11 Co. 66b, 73b, *quoted in United States v. Second National Bank of North Miami*, 502 F.2d 535, 541 (5th Cir. 1974), *cert. denied* 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975); *see Mason v. Cutkomp*, 15 Ill.App.2d 378, 146 N.E.2d 382 (1957). When faced with the question whether words of a

statute or ordinance are of sufficient clarity, a court must first look to the language of the law itself. *Higgins v. Marshall,* 190 U.S.App.D.C. 54, 584 F.2d 1035, 1037 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 931, 99 S.Ct. 2051, 60 L.Ed.2d 659 (1979). All laws should receive a sensible construction. *Cartledge v. Miller,* 457 F.Supp. 1146, 1158 (S.D.N.Y.1978). Where there is no accumulation of jurisprudence on the actual meaning of the words used in an enactment, and the terms are not defined, a court must assume that those who used the words did so intending them to have the meaning commonly and ordinarily understood. *United States v. Porter,* 591 F.2d 1048, 1053 (5th Cir. 1979).

In the case at hand, the parties agree that the ordinance with which they are concerned is a regulation enacted by an Illinois home rule municipality, and that the subject matter sought to be regulated is properly within the municipal police power. The required annual license fee of $150.00 is a charge calculated to furnish funds necessary to administer the ordinance. It is expected that fines which will range from $10.00 to $500.00 for each violation will effectuate its enforcement. By its terms, the ordinance applies only to the sale of "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .". The statutes referred to are ch. 56½ §§ 703(a), 1102(g), Ill. Rev. Stat. (1977).

It is obvious that this ordinance is not a model of legislative clarity; defendants do not claim that it is. Its purpose, nonetheless, is evident. It prohibits the sale or gift of the items covered to any minor; and it appears from the evidence that when it was adopted, those who drafted it, proposed it, and voted on it, intended it as a means of coping with the social problem of drug abuse in this small community located within the greater Chicago metropolitan area. The operative words are not defined, but there is no indication that the crucial words "items," "effect," "paraphernalia," "accessory," or "thing" are

to be given a technical meaning; they are, in fact, ordinary words. In the construction of statutes and ordinances, absent some established technical definition, the words used must be given their common ordinary meaning, *Sheehan* v. *Scott,* 520 F. 2d 825, 829 (7th Cir. 1975), unless the clear intent of the enacting body requires otherwise. *Schreibman* v. *L. I. Combs & Sons, Inc.,* 337 F.2d 410, 412 (7th Cir. 1964); 82 C.J.S. Statutes § 329; 73 Am.Jur.2d Statutes § 206.

There is no guidance from court decisions, no accumulation of jurisprudence, on the actual meaning of the crucial words of this ordinance, particularly in the context of what is now known as drug paraphernalia enactments. *See* Note, *Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream,* 10 Val. Univ.L.Rev. 353 (1976). However, reference can be made to a dictionary. *See Heyen* v. *Willis,* 94 Ill.App.2d 290, 236 N.E.2d 580 (1968); *Nomura (America) Corp.* v. *United States,* 299 F.Supp. 535 (Cust. Ct. 1969), *aff'd,* 435 F.2d 1319, 58 CCPA 82 (1969); 73 Am.Jur.2d Statutes § 223. When this is done Webster's Third New International Dictionary (Unabridged ed. 1971) tells us at p. 1203, that "item" (the ordinance uses the plural) means "something produced by manufacturing or manual labor or in some other way: a piece of goods . . ."; at p. 724, that "effect" means "movable property: goods (such as clothing, jewelry, and other personal property)"; at p. 11, that "accessory" means "an object or device that is not essential in itself but that adds to the beauty, convenience or effectiveness of something else . . ."; and at p. 2376, that "thing" means "possessions, goods: whatever may be possessed or owned or be the object of a right; such as equipment or utensils especially for a particular purpose."

As to the word "paraphernalia", one court has said that it "is not a technical word in the law of crimes, although it may be in the law of property. The word is a word in common usage. Roget's Thesaurus defines it as a noun, plural, meaning belong-

ings, equipment, accessories." *People* v. *Watkins,* 126 Cal. App.2d 199, 271 P.2d 641, 64[illegible] (1954). To those persons who would purchase "paraphernalia . . . designed or marketed for use with illegal cannabis or drugs . . .", within the meaning of the subject ordinance, the word "paraphernalia" is becoming an accepted term. The Court of Appeals for the 8th Circuit has had occasion to observe that "in recent years 'paraphernalia' has become a standard vocabulary word in the vernacular of the drug community, including both drug users and drug enforcement personnel." *United States* v. *Johnson,* 541 F.2d 1311, 1315 (8th Cir. 1976). Webster tells us, at p. 1638 that "paraphernalia" means "articles of equipment . . .".

Plaintiff attaches importance to the testimony of the village attorney who drafted the subject ordinance. It points to several of his statements and argues that they show that not even he knew the meaning of the words used in the village enactment. For example, plaintiff calls attention to the fact that in explaining whether he thought any specific article fell within the ordinance, the attorney said, "[I]t would be up to a police officer to tell me whether they had been designed or used . . .". In this court's judgment, these portions of the village attorney's testimony are taken out of context. At the time he answered the question referred to, he was explaining his dependence on police officers telling him in what manner items potentially within the terms of the ordinance were displayed in a particular store. Thus, the village attorney was explaining his views concerning enforcement of the ordinance, and his dependence on the report of a police officer.

Reliance is also placed on the testimony of the village president, who, the plaintiff contends, revealed an inability to define or describe what items were regulated or prohibited by the subject ordinance. However, the complete testimony of this witness shows she was not an expert on the questions involved. As she explained, her actions in this matter were based on knowledge of drug paraphernalia she acquired from people

who knew the subject. It is obvious from the testimony of this witness that when she voted to adopt the subject ordinance she and her fellow trustees relied on the knowledge of persons acquainted with the problem about which they were legislating. More important, however, is the fact that the time plaintiff was told the ordinance was in effect, there was a set of guidelines which could be used in determining whether it applied to a particular business. In addition, the village trustees had enacted an administrative review ordinance which furnished a means by which any applicant for a license could have a hearing if there was any disagreement about the applicability of the ordinance to a particular item or business.

The guidelines adopted almost contemporaneously with the ordinance, together with the terms used, lead this court to conclude that the operative words of the ordinance under attack are not vague. They are common, ordinary expressions, the meaning of which is known to everyone familiar with the English language. They are sufficiently clear that all persons that acted for and on behalf of the plaintiff could gain a reasonably clear idea of what the ordinance required of anyone who desired, within the village, to sell "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . .".

Proof that these conclusions are valid is best shown by the conduct of those who acted on plaintiff's behalf. As soon as they were advised that the subject ordinance was in force, they unerringly went to the shelves in plaintiff's store and removed all items they thought fell within the ban of the new law, a total of 72. The court has examined each; they are described in the record of this case. Their removal from the shelves of plaintiff's store successfully placed it in compliance with the ordinance. Defendants concede that plaintiff no longer is selling any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .". Obviously,

plaintiff was not hampered by any vagueness in the words of the subject ordinance.

B.

The second issue is whether, as plaintiff contends, the ordinance in question is violative of rights protected by the First Amendment to the federal Constitution. In an extensive brief, citing the leading First Amendment decisions of the United States Supreme Court, plaintiff argues that enforcement of this ordinance against it will have a chilling effect on its sale and distribution of literature, and that enforcement of the ordinance will restrict its design and marketing strategies which plaintiff contends constitute protected commercial speech.

These arguments are highly sophisticated, indeed ingenious, but defendants meet them with the blunt assertion that the subject ordinance does not present any First Amendment question. In no way, they argue, does this ordinance speak to matters of literature or speech. Defendants point out that as an aid to identification of marketing intent, the village attorney provided guidelines which made it clear that if the items covered by the ordinance were displayed with drug oriented literature, the marketing intent would be evident; and therefore, the presumption applied in *Leary v. United States,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) would be stronger. Even then, say defendants, neither the ordinance nor the guidelines are intended to regulate or limit plaintiff's First Amendment rights.

This court agrees with defendants. The ordinance in question does not purport to prohibit advertisement or the expression of commercial ideas as in *Record Museum v. Lawrence Township,* 481 F.Supp. 768 (D.N.J.1979), and in *Bambu Sales, Inc. v. Gibson,* 474 F.Supp. 1297 (D.N.J.1979). Even in the case of a state criminal statute, the mere allegation of a "chilling effect" on First Amendment rights is not sufficient to

warrant the exercise of this court's equitable powers to restrain enforcement of an ordinance. *Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *Record Head Inc. v. Olson,* 476 F.Supp. 366, 372 (D.N.D.1979).

The ordinance defines the scope of the items regulated by the manner in which they are designed or marketed. As plaintiff points out, recent Supreme Court decisions establish that commercial speech is not "wholly outside the protection of the First Amendment." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976). However, these same decisions emphasize that commercial speech that is false, deceptive, or proposes illegal activity may be regulated or prohibited. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics . . .".) *See Friedman v. Rogers,* 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); *Bates v. State Bar of Arizona* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates v. Township of Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). The ordinance presented here is narrowly drawn to limit only the sale of items "marketed for use with illegal cannabis or drugs." Thus, even assuming that marketing is a form of advertising entitled to some degree of First Amendment protection, the restriction applied by this ordinance does not infringe on any protected First Amendment activity. Even if it did, the area of First Amendment freedoms can within narrow limits be subjected to regulation imposed by a reasonable licensing ordinance. *Universal Film Exchanges, Inc. v. City of Chicago,* 288 F.Supp. 286 (N.D.Ill. 1968); *Pent-R-Books, Inc. v. United States Postal Service* 328 F.Supp. 297 (E.D.N.Y. 1971).

C.

Nor is the subject ordinance overbroad, as plaintiff claims. The concept of "overbreadth" applies where the language of a statute or ordinance, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. *Landry v. Daley,* 280 F.Supp. 938, 951 (N.D.Ill.1968) *appeal dismissed,* 393 U.S. 220, 89 S.Ct. 455, 21 L.Ed.2d 392, *rev'd* 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Overstock Book Co. v. Barry,* 305 F.Supp. 842 (E.D.N.Y.1969), *aff'd,* 436 F.2d 1289 (2nd Cir. 1970); *Medrano v. Allee,* 347 F.Supp. 605 (S.D.Tex.1972) *affirmed in part, vacated in part, and remanded,* 416 U.S. 802, 94 S.Ct. 802, 40 L.Ed.2d 566 (1974). The doctrine embodies the constitutional principle that governmental purpose to control or prevent activities may not be achieved by means which sweep unnecessarily broadly and thereby invade areas of protected freedoms. *People v. Dominick,* Co.Ct., 326 N.Y.S.2d 466, 472 (1971). As discussed above, this ordinance does not invade any areas protected by the First Amendment. Also, the ordinance is not a criminal ordinance, unlike the one considered in *Bambu Sales, Inc. v. Gibson,* 474 F.Supp. 1297 (D.N.J.1979); *see* Annot. 92 A.L.R. 47. As further pointed out below, in the discussion of the equal protection issues raised by the plaintiff, the village does have a legitimate interest in controlling the growing use of illegal drugs, and regulating the sale of drug paraphernalia is a rational way of furthering that interest. Considering this, the language of the ordinance is carefully designed to reach only that activity which the village may legitimately regulate—the sale of paraphernalia designed or marketed for use with illegal drugs. Plainly, by no construction of the Constitution has the plaintiff any right to sell, either in the village of Hoffman Estates or anywhere else, any "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . .". The ordinance does not regulate any activity beyond this, and thus is not overbroad.

D.

The final issue to be resolved is whether the subject ordinance, as claimed by plaintiff, is violative of the equal protection clause of the Fourteenth Amendment. Plaintiff argues that the ordinance infringes on the fundamental right of free speech without the showing of a compelling state interest justifying its enforcement; that on its face, the ordinance is arbitrary and irrational in that the classification it creates has no rational relation to a legitimate governmental purpose delagated to the enacting village; and that the ordinance violates the equal protection clause because its terms promote discriminatory enforcement with attendant dangers of arbitrary application.

Defendants agree with plaintiff that the objectives of their ordinance must bear a rational relationship to a legitimate state purpose; and that discriminatory enforcement of the law can result in violation of equal protection since administrative classifications can give rise to equal protection claims. They point, however, to plaintiff's concession that the village, within its jurisdiction, has an interest in preventing the use of cannabis and other illegal drugs. They disclaim the belief that such prevention will be accomplished merely through enforcement of an ordinance; but they express the expectation that enforcement of this ordinance will prevent convicted drug dealers and users from selling drug paraphernalia within the village, and thereby gaining contacts with a ready market. Defendants argue that the marketing approach and the sale of drug paraphernalia both encourage drug use by youths and that this encouragement will be tempered by the ordinance through the requirement that responsible businesses be conducted under a reasonable license requirement. These objectives, defendants insist, are rational interests, consistent with the health and safety concerns of the village community. To this end, the regulation imposed on plaintiff by the ordinance comports with

the same reasonableness that justifies the licensing and regulation of 80 other businesses by the Village of Hoffman Estates.

Again, the court is constrained to agree with defendants. Legislative enactments are presumed valid unless it is shown that the statute or ordinance in question bears no rational relationship to a legitimate legislative purpose. *Williamson* v. *Lee Optical, Inc.*, 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955); *United States* v. *Kiffer*, 477 F. 2d 349 (1973), *cert. denied*, 414 U. S. 831, 94 S. Ct. 62, 38 L. Ed. 2d 65. Of course, a stricter standard of review is required where the enactment infringes upon the exercise of a fundamental right. *Roe* v. *Wade*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). However, as decided above, the ordinance does not infringe on any First Amendment right of the plaintiff. Furthermore, there is no conceivable colorable claim of a fundamental constitutional right to sell items which facilitate and encourage the use of illegal drugs. Thus, the ordinance does not violate the equal protection clause if it bears a rational relationship to a legitimate governmental purpose.

Controlling the use of cannabis and other illegal drugs is clearly a legitimate, even compelling, interest of the village of Hoffman Estates. The objectives of the defendants in enacting this ordinance, to prevent convicted drug dealers and users from selling drug paraphernalia and gaining contacts with a ready market, to prevent a marketing approach which encourages and facilitates illegal drug use, and to require that these items be sold by responsible businesses which are reasonably licensed, are rationally related to the compelling interest in controlling drug abuse, well within the proper health and safety concerns of the village.

III.

For these reasons, it is this court's judgment that on its face and in its application to the plaintiff in this case, the Flipside,

Hoffman Estates, Inc., an Illinois corporation, Ordinance No. 969-1978, Municipal Code of the Village of Hoffman Estates, is a valid and constitutional municipal enactment. Therefore, plaintiff is not entitled to injunctive relief, damages, nor to a declaration that the ordinance is unconstitutional. Judgment will be entered in favor of the defendants, each of them; and against the plaintiff. The clerk is ordered to make an appropriate judgment entry in accordance with Rule 58(1), Federal Rules of Civil Procedure.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 5, 1981.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. GEORGE TEMPLAR, Senior District Judge*

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation, Plaintiff-Appellant,

No. 80-1462 *vs.*

VILLAGE OF HOFFMAN ESTATES, et al., Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 2114

George N. Leighton, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Senior District Judge George Templar from the District of Kansas is sitting by designation.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT FROM AN ORDER OF THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

File Number 80-1462

The Flipside, Hoffman Estates, Inc., an Illinois corporation, *Plaintiff-Appellant,* *vs.* Village of Hoffman Estates, et al., *Defendants-Appellees.*	Notice of Appeal

Notice is hereby given that Village of Hoffman Estates, et al, defendants above named, hereby appeal to the United States Supreme Court from the order entered by the United States Court of Appeals for the Seventh Circuit in this action on the 5th day of February, 1981, and the opinion rendered by said Court on the 12th day of January, 1981, upon the basis that said order and opinion was contrary to the Fourteenth Amendment of the Constitution of the United States.

RICHARD N. WILLIAMS
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1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 882-9100
Attorney for Village of Hoffman Estates

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16— ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:
It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

PASSED this 20th day of February, 1978

APPROVED this 20th day of February, 1978.

VOTE: AYES 3 NAYS 3 ABSENT 0
President Hayter voted aye.

APPROVED:

Virginia M. Hayter
Village President

ATTEST:

Regina F. Geck
Deputy Village Clerk

RECENT DRUG PARAPHERNALIA CASES

Four recent decisions have upheld the Model Act in its entirety. *Mid-Atlantic Accessories Trade Assoc.* v. *Maryland,* 500 F. Supp. 834 (D. Md.—1980); *Florida Businessmen for Free Enterprise* v. *City of Hollywood,* No. 80-6157-Civ-NCR (S. D. Fla. Aug. 29, 1980); *Delaware Accessories Trade Assoc.* v. *Gebelein,* No. 80-285 (D. Del. Aug. 15, 1980); and *World Imports, Inc.* v. *Woodbridge Township,* No. 80-1414 (D. N. J. June 8, 1980). One other decision has also found the Model Act to be constitutional. *The Casbah, Inc.* v. *Thone,* No. 80-0271 (D. Neb. Sept. 26, 1980). Very recently, the Louisiana statute, which is derived in substantial part from the Model Act, was found to be constitutional. *Tobacco Accessories* v. *Treen,* Civil No. 80-3372 (E. D. La. Oct. 28, 1980). Thus, there are six recent Federal District Court decisions which have upheld the constitutionality of the Model Act in its entirety or in substantial part.

In addition, there are many reported decisions upholding drug paraphernalia statutes which were not based on the Model Act. These include *Record Head Inc.* v. *Olson, supra; Florida Businessmen for Free Enterprise* v. *State of Florida,* No. TCA 80-0954 (N. D. Fla. Sept. 30, 1980); *Levas* v. *Village of Antioch,* No. 80-C-1574 (N. D. Ill. Apr. 22, 1980); *Magnani* v. *City of Ames,* No. 80-229A (S. D. Iowa—1980); *Cardarella* v. *City of Overland Park,* No. 86246 (Johnson County, Kans., Dist. Ct. Dec. 3, 1979), and *Tobacco Road* v. *City of Novi,* No. 79-71000 (E. D. Mich. June 21, 1979).

Other decisions have held state statutes not based on the Model Act to be unconstitutional in whole or in part. These include *Geiger* v. *City of Eagen,* 618 F. 2d 26 (8th Cir. 1980); *High Ol' Times, Inc.* v. *Busbee,* 621 F. 2d 135 (5th Cir. 1980); *Knoedler* v. *Roxbury Township,* 485 F. Supp. 990 (D. N. J. 1980); *Record Museum* v. *Lawrence Township,* 481 F. Supp.

768 (D. N. J. 1979); *Bambu Sales, Inc.* v. *Gibson*, 474 F. Supp. 1297 (D. N. J. 1979); *Record Head Corp.* v. *Sachen*, No. 80-C-639 (E. D. Wisc. Sept. 30, 1980); *Smith* v. *Roark*, No. 80-2110 (S. D. W. Va., May 13, 1980); *Hejira Corp.* v. *Mac Farlane*, No. 80-F-824 (D. Colo. Sept. 5, 1980) ; *Florida Businessmen for Free Enterprise* v. *Pinellas County*, No. 80-482 (M. D. Fla. May 15, 1980); *Music Stop, Inc.* v. *City of Ferndale*, 488 F. Supp. 390 (E. D. Mich, 1980); and *Indiana Chapter, NORML, Inc.* v. *Sendak*, No. TH 75-142-C (S. D. Ind. Feb. 4, 1980).